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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BOURNE CO., :

Plaintiff, :

-against- :

07 Civ. 8580 (DAB)

TWENTIETH CENTURY FOX FILM :
CORPORATION, FOX BROADCASTING : **DECLARATION OF LAWRENCE**
COMPANY, TWENTIETH CENTURY FOX : **FERRARA, Ph.D. IN SUPPORT OF**
TELEVISION, INC., TWENTIETH : **DEFENDANTS' MOTION FOR**
CENTURY FOX HOME : **SUMMARY JUDGMENT**
ENTERTAINMENT, INC., FUZZY DOOR
PRODUCTIONS, INC., THE CARTOON :
NETWORK, INC., SETH MCFARLANE,
WALTER MURPHY, :

Defendants. :

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I, LAWRENCE FERRARA, hereby declare as follows:

1. I am Professor and Director of The Steinhardt School, Music and Performing Arts Professions, at New York University in New York, New York. I have been retained by Defendants in this action as a musicology expert in connection with the instant action. My *curriculum vitae* is attached as **Exhibit A** hereto. I submit this declaration to set forth information and materials in support of Defendants' Motion for Summary Judgment (the "Motion"). Unless otherwise indicated herein, I have personal knowledge of the facts and opinions set forth herein and, if called as a witness, could and would testify competently thereto.

2. I have been asked to complete a comparative musicological analysis of the musical composition embodied in the sound recording of “When You Wish Upon A Star” which is part of the 1940 motion picture *Pinocchio* (hereafter “Wish Upon a Star” or “*Pinocchio song*”) and the musical composition embodied in a song from the *Family Guy* TV series episode entitled “When You Wish Upon A Weinstein” (hereafter the “Family Guy Song”). I have assessed similarities and differences, individually and in the aggregate, first to determine how much of the music in the Family Guy Song is similar to Wish Upon A Star and secondly, whether or not and to what extent the music in the Family Guy Song is transformative and builds upon the music in Wish Upon A Star to create new, original expression. A true copy of my complete analysis and report (the “Ferrara Report”), dated February 26, 2008, previously provided to Plaintiff in this action is annexed hereto as **Exhibit B**.

3. The Family Guy Song incorporates a sufficient portion of the musical composition from Wish Upon A Star to conjure up an image of Wish Upon A Star. However, there is no wholesale copying of Wish Upon A Star in the Family Guy Song. In comparison to Wish Upon A Star, the musical composition in the Family Guy Song is substantially transformed and changed into new musical expression.

4. As set forth in my Report, on the basis of my musicological analysis, it is my opinion that the Family Guy Song is a musical parody of Wish Upon A Star. This conclusion will be readily apparent to the Court itself by just listening to the two works.¹ They are, as Plaintiff’s proffered expert musicologist Sandra Wilbur (“Wilbur”) testified, simply “not the

¹ Compare Wish Upon A Star on *Pinocchio* DVD (submitted as Exhibit B to the accompanying declaration of Seth MacFarlane) with Family Guy Song from the Episode on DVD (submitted as Exhibit A to the accompanying MacFarlane declaration).

same.” (Wilbur Dep. 90:8-19)². Whatever amount of copyrightable expression from Wish Upon A Star the Family Guy Song is deemed to have taken, it was not “too much” or so much as to be able to serve as a substitute in the market for Wish Upon A Star. (*See* Wilbur Dep. P. 89:10 – 90:8-19).

Summary of the transformation of musical elements into new musical expression.

5. The principal components in comparing similarities and differences between two musical compositions are: (1) structure; (2) harmony; (3) rhythm; and (4) melody. As summarized immediately below, in each of these principal components, musical elements in Wish Upon A Star are substantially transformed and changed into new musical expression in the Family Guy song.

6. **Structural transformation** in the Family Guy Song is evidenced, in part, by the creation of two, new substantial sections of music that are absent in Wish Upon A Star: the “interlude” and the closing or “coda” sections. These two, new sections of music in the Family Guy Song constitute a total of 19 bars of music: the “interlude” is 15 bars (and is in the middle of Family Guy Song) and the “coda” is 4 bars (and is at the end of the Family Guy Song). (*See* Ferrara Report, Exhibit A, bars 25-39 and 50-53.).

7. **The transformation of harmony** in the Family Guy Song as compared with Wish Upon A Star is substantial. Comparative charts and analysis of the harmony of the verse and chorus sections in the Family Guy Song and Wish Upon A Star (*see* paragraphs 11 - 16 Ferrara Report) strongly demonstrate that there are many, many more harmonic differences than similarities. That there are similarities is not surprising; both songs use many basic chords.

² Wilbur’s deposition testimony is attached as Exhibit F to the accompanying declaration of Jacques Rimokh. The testimony is cited using the convention “xx:yy,” where the first number (xx) refers to the page in the transcript and the second numbers (yy) refer to the line numbers on the designated page.

8. **The transformation of melodic rhythm** in the Family Guy Song evidences new expression as compared with Wish Upon A Star. First, the melodic rhythm in the “interlude” is vastly different from the melodic rhythm in Wish Upon A Star. Second, the melodic rhythm in the vocal sections in the Family Guy Song and Wish Upon A Star evidence similarities and differences with the melodic rhythm in Wish Upon A Star.

9. There are more similarities in the melodic rhythm between the Family Guy Song and the Deposit Copy of “When You Wish Upon A Star” as there are between the Family Guy Song and Wish Upon A Star. However, those additional similarities in melodic rhythm do not impact on my conclusions. Indeed, (1) more than half of the melodic rhythms are different between the Family Guy Song (which has 157 melodic notes) and the Deposit Copy of “When You Wish Upon A Star,” (2) there is nothing distinctive about the melodic rhythm in “When You Wish Upon A Star,” and (3) the transformative changes and resulting differences in structure, harmony, and melodic pitches between the Family Guy Song and Wish Upon A Star represent substantial transformative change. On that basis, the increased similarity in melodic rhythm between the Family Guy Song and Wish Upon A Star does not impact on the fact that there is an absence of wholesale copying and thereby, the Family Guy Song could not substitute for Wish Upon A Star.

10. Now turning to the **melodic transformation in terms of melodic pitches**, the melodic pitches in the Family Guy Song evidence substantial transformation as compared with Wish Upon A Star. First, the melodic pitches in the “interlude” in the Family Guy Song are vastly different from the melodic pitches in Wish Upon A Star. Second, the melodic pitches in the vocal parts in the Family Guy Song and Wish Upon A Star evidence similarities and differences. If we accept, *arguendo*, Plaintiff’s proffered expert, Ms. Wilbur’s (“Wilbur”)

omission of the “interlude” and “coda” sections in the Family Guy Song, approximately 25% of the correlative melodic pitches are the same while approximately 75% of the correlative melodic pitches in the Family Guy Song and Wish Upon A Star are different. Considering the entire Family Guy Song musical composition (which has 157 melodic notes), approximately 15% of the melodic pitches in the Family Guy Song are the same as the correlative melodic pitches in Wish Upon A Star and approximately 85% have different melodic pitches.

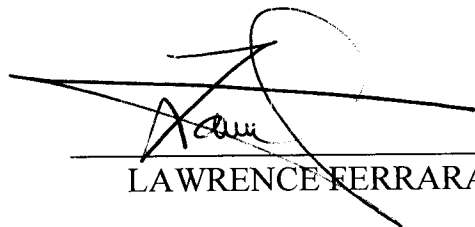
11. In summary, the substantial aggregate of transformative changes in structure, harmony, rhythm, and melody in the Family Guy Song represent a qualitatively and quantitatively significant amount of new musical expression in the Family Guy Song as compared with Wish Upon A Star. As noted in the Ferrara Report, there is a sufficient amount of musical similarity to conjure up an image of Wish Upon A Star, for example through the use of the first four notes of the seven note hook³ and the reiteration, two more times, of those four notes at the beginning of subsequent musical phrases. (The seven note hook in Wish Upon A Star is never heard in Family Guy Song in its entirety.). However, each iteration of that partial portion of the hook from Wish Upon A Star is followed by substantial transformative changes in the musical composition. These substantial changes result in substantial differences between the Family Guy Song and Wish Upon A Star and new musical expression in the Family Guy Song.

³ Ms. Wilbur agrees that the hook in Wish Upon A Star is seven notes and that only the first four notes are used in Family Guy Song. (Wilbur Dep., 53:24 – 53:18)

12. Nothing in Ms. Wilbur's report or testimony undercuts or changes my opinion that the Family Guy Song is a musical parody of Wish Upon A Star. Family Guy Song incorporates a sufficient portion of the musical composition from Wish Upon A Star to conjure up an image of Wish Upon A Star. However, the amount taken was certainly not "unreasonable," that is, the Family Guy Song did not take so much expression from Wish Upon A Star that it could serve as a substitute for Wish Upon A Star. In comparison to Wish Upon A Star, the musical composition in the Family Guy Song is substantially transformed into new musical expression.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of April, 2008.



LAWRENCE FERRARA, Ph.D.